* **HIGH COURT OF DELHI : NEW DELHI**

\+ **OMP No. 128/2007**

Judgment reserved on: 29th March, 2007

% Judgment delivered on: 24th April, 2007

M/s IJM – SCL (JV) & Ors. ..... Applicants
Through: Mr. George Thomas with Mr.G.K.Jose, Advocates

versus

M/s National Highway Authority of India & Anr. ..... Respondents
Through: Mr.SandeepSethi Sr.Advocate with Mr. Krishan Kumar, Advocate

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HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment? No
2. To be referred to Reporter or not? No
3. Whether the judgment should be reported in the Digest? No

VIPIN SANGHI, J.

1. The parties had entered into an agreement which contained an arbitration clause in Clause No. 67.3 (b) of the contract. Clause 67.3 (b) (i) reads as follows:

> "Any dispute in respect of which :
> b) amicable settlement has not been reached within the period stated in sub clause 67.2 shall be finally settled:

> i) by arbitration in accordance with the Indian Arbitration Act, 1940, or any statutory amendment thereof. The arbitral tribunal shall consist of 3 arbitrators, one each to be appointed by the employer and the Contractor, and the third to be appointed by the Ministry of Surface Transport."

2. Since disputes arose between the parties the applicants nominated one arbitrator. Respondent No.1 also nominated the second arbitrator. However, the Ministry of Surface Transport failed to nominate the third arbitrator. The applicants filed Arbitration Application No. 178/2004 in this Court. The said application was allowed on 20.9.2004 and the Court appointed Mr. Justice R.P.Sethi, a retired Judge of Supreme Court of India as the Presiding Arbitrator to adjudicate upon the disputes between the parties.

3. The arbitration proceedings were undertaken before the Tribunal thus constituted and arguments were heard on 30.11.2006. It is stated that the arbitral Tribunal reserved its award in the two references before it. Unfortunately the Presiding Arbitrator, Mr. Justice R.P.Sethi, (Retired) expired on 17.1.2007 before the award was made and punished.

4. The applicants sent a communication on 22.1.2007 to respondent No.2 i.e. the Director General, Ministry of Surface Transport to appoint the Presiding Arbitrator within 30 days of the receipt of the notice. A copy of the notice has been placed on record. In the notice the applicants also stated that "*In case of your failure to*

appoint the 3rd arbitrator within the notice period of 30 days, my client shall proceed further in the matter to get the 3rd arbitrator appointed in accordance with law."

5. A copy of this communication was also sent to the Chairman, NHAI and the other two members of the Arbitral Tribunal. This communication was sent by Registered post and as per the postal certificate placed on record, it was delivered to the addressee on 23.1.2007.

6. Admittedly, the Ministry of Surface Transport did not nominate the third arbitrator within the 30 days period and consequently, the applicant filed the present application. It is submitted by learned counsel for petitioners that the petition was initially styled as an Arbitration Application under Section 15 read with Section 11(6) of the Arbitration and Conciliation Act, 1996 (The Act), but on account of the objection raised by the Registry, it was described as an Original Miscellaneous Petition (OMP) under Section 15 of the Act and reference to section 11 (6) of the Act was deleted from the index, the title of the petition as also the supporting affidavit filed with the petition. Even the statutory charges of Rs.1000/- payable on an Application under Section 11(6) of the Act was detached before refiling of the petition.

7. This petition was filed in this court on 03-03-07 and it came up before the court for the first time on 09-03-07. Appearance

was put on behalf of respondent No.1, i.e., NHAI on the same day, and notice was issued to respondent No.2 returnable on 29-03-07. On 29-03-07, counsel for the respondents made a statement that on 09-03-07 the Ministry of Surface Transport had nominated the third arbitrator. Upon enquiry, it was informed that he was one Shri D.P.Gupta, a retired engineer. A copy of his appointment letter dated 9.3.2007, along with a copy of a communication dated 14.3.2007 issued by Shri D.P.Gupta, taking note of his appointment, has been handed over in Court.

8. Counsel for the petitioner submits that on account of failure of respondent No.2 to nominate the arbitrator within 30 days of issuance of the notice dated 22-01-07, which was received on 23-01-07, and even till the date of filing of the present petition on 03-03-07, the Ministry of Surface Transport had lost its right to nominate the third arbitrator and the nomination of the third arbitrator made by respondent No.2 on 09-03-07 is of no avail. He submits that the said nomination is incompetent in view of the decisions of the Hon'ble Supreme Court in ***Datar Switchgears Ltd., JT 2000 (Suppl.2) SC 226*** and a Full Bench decision of this court in ***HBHL-VKS (J.V.) Vs. Union of India and others, 2007(1) Arb. LR 252 (Delhi) (FB)***.

9. He refers to para 19 of the decision in *Datar Switchgears Ltd.* (supra) and para 40 of the decision in *HBHL-VKS (J.V.)* supra). In relation to Section 11(6) of the Arbitration & Conciliation Act it has

been held that if a party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appoint does not get automatically forfeited after expiry of 30 days, if the opposite party makes an appointment even after 30 days of the demand, *but before the first party has moved the court under Section 11.* Therefore, in a case arising under Section 11(6) of the Arbitration & Conciliation Act, if the opposite party has not made the appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but the appointment has to be made before the former files an application under Section 11 of the Arbitration & Conciliation Act seeking appointment of an arbitration. Only then, the right of the opposite party ceases.

10. Counsel for the respondents submits that the present petition is one under Section 15 of the Act, whereas the aforesaid decisions have been rendered in relation to Section 11 of the Act. He submits that the said judgments have no applicability in the facts of the present case. He also submits that under sub-clause 67.3 (b)(iv) the time provided for making the substitute appointment is 60 days and not 30 days. It is also submitted by the counsel for the respondents that the petitioners had deliberately misdirected the notice dated 22-01-07 by addressing the same to the Director General in the Ministry of Surface Transport which was the reason for some

delay in nomination of the arbitrator.

11. The argument of the respondents that the aforesaid judgments do not apply to the facts of the present case does not appear to be correct. Section 15 of the Act merely states that where the mandate of an arbitrator terminates, "*a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.*" This only means that when the arbitrator nominated as the nominee of the Ministry of Surface Transport lost his mandate on 17.1.2007 (in this case on account of his demise), the said Ministry of Surface Transport became entitled to nominate another arbitrator in his place by following the same procedure as is prescribed, by virtue of Section 15(2) of the Act.

12. It is only Section 11 of the Act which provides the procedure for appointment of an arbitrator by the Chief Justice or his designate. Section 15 does not provide for the procedure to approach the Chief Justice, but merely states that the same procedure would apply for substituting the vacancy that is created on account of termination of the mandate of an arbitrator, as is prescribed in the rules applicable to the appointment of the arbitrator.

13. The petition as originally filed under Sections 15 and 11(6) of the Act was correctly filed by the petitioner and it is apparent that on account of an erroneous office objection, the petitioner deleted the reference to Section 11(6) of the Act. However, the nomenclature

used by the petitioner to describe this as an O.M.P and not an arbitration application (A.A), and the omission to mention Section 11(6) of the Act is not decisive or fatal to the maintainability of this petition. Therefore, in my view, the decisions cited by the petitioner squarely apply in the facts and circumstances of the present case.

14. Coming to the next argument of the Respondent, clause 67.3 (b)(iv) of the contract reads as follows:

> "If one of the parties fail to appoint its arbitrators in pursuance of sub para (i) above, within 60 days after receipt of the notice of the appointment of its arbitrators by the other party, the Ministry of Surface Transport shall appoint the arbitrator."

15. By the said clause, 60 days time is provided to the second contracting party for nominating an arbitrator, where the first party has nominated an arbitrator. Upon failure of the second party to nominate an arbitrator within 60 days, the Ministry of Surface Transport is authorised to nominate the arbitrator.

16. It is important to note that no time is prescribed in sub-clause 67.3(b)(iv) within which Ministry of Surface Transport is to appoint the third arbitrator upon failure of one of the parties to appoint an arbitrator within 60 days. If the intention of the parties was to provide the Ministry of Surface Transport 60 days to nominate the third arbitrator, the same would have been so specifically provided. That not having been done, to my mind, the implication has to be that the parties did not agree to give 60 days to the Ministry of Surface Transport to nominate the third arbitrator in a case covered by clause

67.3(b)(iv). In any case, on facts the present is not a case falling under clause 67.3(b)(iv). It is a case falling under clause 67.3(b)(i) by virtue of Section 15(2) of the Act. Clause 67.3 (b) (i) states; "The arbitral tribunal shall consist of 3 arbitrators, one each to be appointed by the employer and the Contractor, and the third to be appointed by the Ministry of Surface Transport."

17. Since no time is prescribed within which the nomination of the third arbitrator ought to have been made, the same should have been made within 30 days.

18. The submission that the notice dated 22-01-07 was misdirected also does not appear to be correct. Counsel for the petitioner points out that in fact, there is no Ministry of Surface Transport in existence any more, and the said ministry has been reorganised as the Ministry of Shipping, Road Transport and Highways and the concerned department is the Department of Road Transport and Highways. He submits that in its letter dated 09-03-07 issued by respondent No.2 communicating appointment of Shri D.P. Gupta, copy whereof was delivered in court, it has nowhere been asserted that the appointment could not be made earlier on account of the notice dated 22-01-07 being addressed to a wrong authority. Counsel for the petitioner points out that only after the court had issued notice on this petition on 09-03-07, respondent No.1 appears to have lobbied with respondent No.2 to issue the communication dated 09-03-07.

19. Since the Ministry of Surface Transport failed to do the needful within the period of 30 days of receipt of the notice and it also did not make the appointment till the time the present petitioner was filed in this court by the petitioner, in my view the said authority lost its right to make the appointment of the third arbitrator. The nomination made vide communication dated 9-3-07 of Shri D.P.Gupta is, therefore, of no avail.

20. Considering the fact that earlier Mr. Justice R.P. Sethi (Retd.) Judge of the Hon'ble Supreme Court had been appointed by this court, as the third Arbitrator, I now appoint Mr. Justice R.C. Lahoti (Retd.), former Chief Justice of India as the third and presiding arbitrator of the Arbitral Tribunal. This Order would, however, take effect upon the petitioner depositing the fee of Rs.1,000/- as is prescribed under the Rules on an application under Section 11(6) of the Act. The petition is accordingly disposed of. The parties are left to bear their respective costs.

April 24th , 2007 Vipin Sanghi, J.
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